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SYMPOSIUM

AFFORDABLE HOUSING IN SUBURBIA: THE IMPORTANCE BUT LIMITED POWER AND EFFECTIVENESS OF THE STATE OVERRIDE TOOL

SAM STONEFIELD*

“An Act providing for the construction of low and moderate income housing in cities and towns and providing for relief from local restrictions hampering such construction.”

Title of chapter 777 of the Acts and Resolves of 1969

“Developing communities must make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may wish to live there.”

Justice Frederick Hall, Southern Burlington County
NAACP v. Township of Mount Laurel,
336 A.2d 713 (1975) (“*Mt. Laurel I*”).

I. THE CONFERENCE AND ITS PAPERS: PURPOSES AND CONTEXT

On December 10, 1999, the Western New England College School of Law hosted a conference on “Increasing Affordable Housing and Mobility in Three New England States and New Jersey: Comparative Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law.” The conference had two goals. First, in commemoration of the 30th anniversary of the 1969 enactment of the Massachusetts Comprehensive Permit Act (“chapter 40B”), the Law School desired to recognize and to honor some of the many people and organizations that contributed to the statute’s initial passage, survival, and imple-

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mentation over the ensuing decades.¹ Notwithstanding the shortcomings mentioned at the conference, examined in the conference papers, and addressed further in other venues,² the Massachusetts statute remains a remarkable achievement, and its creators and supporters deserve our admiration and congratulations. Second, the conference was designed to facilitate the first-ever exchange of information about the 4 extraordinary statutes enacted in Massachusetts in 1969, New Jersey in 1986,³ Connecticut in 1989,⁴ and Rhode

1. The awardees are described in "Honorees." See 22 W. NEW ENG. L. REV. app. B (forthcoming 2001). A schedule of the Conference is also provided in Appendix B. See *id.*

2. There are at least two examples of valuable post-conference discussions of the Massachusetts statute. The Citizens Housing and Planning Association ("CHAPA") presented its own very successful commemorative program on the anniversary of chapter 40B on October 15, 1999 that included a report on the statute's implementation. More importantly, CHAPA has organized a working group that is preparing a report on how to improve the operation and effectiveness of the Massachusetts statute. See <http://www.chapa.org> (providing further information about the organization and this initiative).

Additionally, the Massachusetts Housing Partnership Fund sponsored a study, conference, and follow-up workshops on inclusionary zoning ordinances — local initiatives that can often complement chapter 40B efforts — in Massachusetts cities and towns. Both the report and other information about the conference are available on the MHP web site, <http://www.mhpfund.com/fund/zoning>.

The continued deliberations of the Connecticut Blue Ribbon Commission led to a very informative report whose recommendations were largely adopted by the Connecticut legislature in the 2000 amendments to the Connecticut Affordable Housing Act. See BLUE RIBBON COMM'N, STATE OF CONN., HOUSING REPORT (1989). State Representative Patrick Flaherty, co-chair of the Blue Ribbon Commission, deserves special recognition for his intelligent and skillful leadership in this area.

3. N.J. STAT. ANN. § 52:27D-301 to 329 (West 1986). Unlike the statutes of the other three jurisdictions, the New Jersey statute has a constitutional mandate. The New Jersey Supreme Court found that the "general welfare" clause of the New Jersey state constitution imposed on every town an obligation to meet its fair share of the regional housing need. See *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 727-28 (N.J. 1975) [hereinafter *Mount Laurel I*]. The court later created a set of special procedures and rules for implementing this constitutional principle. See *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 423-35 (N.J. 1983) [hereinafter *Mount Laurel II*]. After the legislature rejected *Mount Laurel II* by passing a statute, the Housing Opportunity Act, the New Jersey Supreme Court upheld the Act as a constitutionally-adequate mechanism for enforcing the *Mount Laurel I* constitutional right. See *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621, 642-43 (N.J. 1986).

The history and politics of the *Mount Laurel* litigation and legislation are engagingly described in two recent books. See CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AUDACIOUS JUDGES* (1996); DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA* (1995); see also Bonnie L. Koneski-White, *Increasing Affordable Housing and Regional Housing Opportunity in New England*, 22 W. NEW ENG. L. REV. (forthcoming 2001) (providing the citations to the voluminous literature on the *Mount Laurel* doctrine).

4. Municipal Housing Finance Assistance Act, CONN. GEN. STAT. § 8-300 to 315

Island in 1991.⁵ Given the participants' combined decades of experience, there was a sense that public officials, housing developers, housing advocates, practicing lawyers, and academics would benefit from a comparative assessment of these laws, their administration and interpretation, as well as an examination of the success and failures of implementation in the four states. The conference more than met its goals. The attendance, interaction, and discussion at the conference exceeded all expectations, and the papers that follow significantly advance the understanding of the use of this statutory tool to stimulate the production of suburban affordable housing and to encourage city-to-suburb mobility. I am grateful to the panelists, attendees, Dean Donald Dunn, Professor Eric Gouvin, and many others for their assistance in making the conference possible, and to the Law Review for making the papers accessible to a broader audience.

This article offers a brief comparative overview and critique of the four statutes explored at the conference; the other papers will analyze them in greater depth. At the broadest level, these statutes address such major themes as urban decline and suburban growth, racial and economic segregation, and localism versus regionalism. The four state statutes are intertwined with these themes and with other statutes and programs that have helped to shape post-World War II development of America's cities and suburbs. Thus, it is not possible to understand fully or to commemorate properly the 30th anniversary of Massachusetts Comprehensive Permit statute without also recognizing the 50th anniversary of the federal Housing Act of 1949, the landmark federal law that established a "decent home and a suitable living environment for every American family" as a national goal.⁶ The programs and policies developed under the

(1989); see Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. (forthcoming 2001) (discussing the origins, interpretation, and evolution of the Connecticut statute).

5. Rhode Island Low and Moderate Income Housing Act, ch. 91-154, 1991 R.I. Pub. Laws 1 (codified at R.I. GEN. LAWS §§ 45 to 53-1 (1991)). As Judge Stephen Erickson informed us at the conference, the Rhode Island statute was closely patterned on the Massachusetts statute, with 2 notable exceptions. First, the composition of the administrative body that enforces the statute differs (the Rhode Island agency has 9 members, including a district court judge, with appointments made variously by the Chief of the district court, Majority leader of the Senate, and Speaker of the House, and the Governor.) See R.I. GEN. LAWS §§ 45 to 53-7 (1998). Second, the definition of region which, under the Rhode Island statute, means the entire state is different.

6. Housing Act of 1949, 42 U.S.C. §§ 1441-90 (1994) (presenting this famous statement of the national policy in § 1441 of the statute). The 1949 Housing Act is most notable for its authorization of a federally-funded, locally-administered urban renewal

Housing Act and other statutes (such as the federal highway program) helped guide post-World War II America onto the path of suburban expansion that began in the early 1950s and continues to this day.⁷ Occurring when the dominant *Euclidean* zoning paradigm enshrined local control of most land use decisions,⁸ and when racial discrimination was both legal and widespread,⁹ this explosion of suburban growth created a geography of inequality that led the Kerner Commission in 1968 to state that we are “moving towards two societies, one black and one white — separate and un-

program in Title I and public housing program in Title III. It and its companion legislation also extended and broadened the lending and insurance authority of the Federal Housing Administration that had been first created pursuant to the Housing Act of 1934. *See id.* at 1907-08; 1558-59. There is also an extremely useful and informative symposium published by the Housing Policy Debate Journal in volume 11 that describes the political history and implementation of the 1949 Housing Act from a variety of perspectives. 11 HOUSING POL’Y DEBATE 291-520 (2000).

7. *See* Robert Fishman, *The American Metropolis at Century’s End: Past and Future Influences*, 11 HOUSING POL’Y DEBATE 199, 200 (2000) (citing a recent survey of 250 planners, architects, and urban historians which found that the top 10 influences on the growth of the American Metropolis during the past 50 years were: the 1956 Interstate Highway Act and dominance of the automobile, FHA mortgage financing and subdivision regulation, deindustrialization of central cities, urban renewal, Levittown and mass-produced suburban tract housing, racial segregation and job discrimination in cities and suburbs, enclosed shopping malls, Sunbelt-type sprawl, air conditioning, and the urban riots of the 1960’s); *see also* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1992) (discussing the development of the American suburb); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). *Compare* ROSALYN BAXANDALL & ELIZABETH EWEN, *PICTURE WINDOWS: HOW THE SUBURBS HAPPENED* (2000) (providing a contrasting view of suburban development and life), *with* ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000) (criticizing suburbia from the “new urbanism” perspective).

8. *See* *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a local zoning ordinance from constitutional attack and establishing the pattern of deferential review of zoning laws and decisions that predominates American land use law); *see also* Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. (forthcoming 2001) (discussing the origins of zoning laws and how the historical context of the *Euclid* case performs a valuable service in connecting the emergence of modern zoning with the then-prevailing discriminatory practices and attitudes).

9. *Brown v. Board of Education* was not decided until 1954. 347 U.S. 483 (1954). The federal Fair Housing Act, prohibiting housing discrimination as a matter of federal law, was not enacted until 1968. Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)). Although racial zoning was held unconstitutional in 1917, *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), and racially restrictive covenants were overturned, *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), the Federal Housing Administration and the Veterans Administration permitted (and in some cases required) racial discrimination in the subdivisions whose mortgages they insured, and for years refused to lend to properties occupied by African-Americans. *See generally* CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* (1955); Fishman, *supra* note 7, at 200-17.

equal.”¹⁰ The statutes discussed at the conference were in response to that inequality and its economic and racial segregation, and represent an attempt to create, instead, “a geography of opportunity.”¹¹

Massachusetts, New Jersey, Connecticut, and Rhode Island (and, to date, *only* these four states)¹² have enacted and imple-

10. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) [hereinafter KERNER COMM'N REPORT]. The report also noted that the continuation of present policies would “make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities: the other, predominately white and affluent, located in the suburbs.” *Id.* at 10.

11. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL'Y DEBATE 231, 231 (1995). The program Rosenbaum discusses was a voucher program, not a zoning and production program, but the goal of creating the “geography of opportunity” is the same.

12. While several other jurisdictions — notably California, Oregon, Florida, and Montgomery County, Maryland — have encouraged suburban affordable housing through legislation, they have used techniques other than state override statutes. California cities and towns primarily use inclusionary zoning ordinances. See Nico Calavita, et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 117-18 (1997). Dating back to the 1970s, inclusionary zoning ordinances were created both as part of air pollution control programs encouraged by the federal Environmental Protection Agency and in response to skyrocketing housing prices. As of 1994, 64 jurisdictions in California had inclusionary housing ordinances, which are said to be responsible for the production of 22,572 affordable housing units (with an additional 2439 more in the pipeline), mostly aimed at single family buyers with low- (between 50% and 80% of median income) and moderate-incomes (between 80% and 120% of median income). *Id.* at 123; see also Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N. 150, 158 (1998). While there is a California override statute, CAL. GOV'T CODE §§ 65580-65589.8 (1997), there are no reported cases involving any override, no state regulations establishing any override procedures, and no discussion of the override's use in the extensive literature on California affordable housing. Thus, this Author concludes that the California override statute is not used. The override provision is part of a comprehensive statute that requires each town to have a “housing element” in its municipal plan and further requires the housing element to address housing needs of the town and region. See *id.* § 65302.

Other states have enacted broad planning statutes that identify (though do not fund or require) the construction of suburban affordable housing as a way of meeting regional housing need. See FLA. STAT. ANN. § 163.3161-3215 (West 2000); OR. REV. STAT. § 197 (1991); see also GA. CODE ANN. § 36-70-1 to 70-5 (2000); GA. CODE ANN. § 50-8-30 to 8-46 (1996); ME. REV. STAT. ANN. tit. 30A, §§ 4312-49 (West 1996). See generally Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other — and Often Agree*, 8 HOUSING POL'Y DEBATE 11 (1997) for a further analysis of the Oregon statute and Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63 (1996) for a further analysis of the Florida statute. At the county level, Montgomery County, Maryland has had a county-wide inclusionary zoning requirement since 1975 that requires developers to make 15% of the units in all new developments affordable and to offer 1/3 of those affordable units to the regional housing authority (the Montgomery County Housing

mented statutes that authorize a state administrative agency or court to override, under certain conditions, local zoning decisions that disallow proposed new construction of suburban affordable housing. The statutes are extraordinary both politically and doctrinally. Given that population and political power shift to the suburbs and the widespread perception that most suburban voters oppose affordable housing in their communities (a perception often referred to as the “NIMBY” phenomenon¹³), it is politically extraordinary that supporters garnered a legislative majority in even four state legislatures to authorize the state override of local zoning decisions. The statutes are also extraordinary doctrinally in their rejection of the *Euclidean* paradigm that dominates American land use law. Replacing the traditional deference to local interests with two well-established legal techniques—balancing and burden-shifting—to eliminate “unreasonable” local barriers, the statutes require that local interests be balanced against state-defined regional need and place the burden of persuasion on the locality to justify a decision that excludes affordable housing.

The description and analysis of these statutes in the next three sections elaborates a bottom-line assessment: these statutes are an important, but also a very limited, tool. There is no question that

Opportunity Commission). See DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 280-99 (1999); see also MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 111-12 (1976) (discussing Montgomery and Fairfax counties); HERBERT M. FRANKLIN ET AL., *INZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 131 (1974) (discussing Montgomery County, Fairfax County, and Los Angeles, CA). The Montgomery County program has been the most successful in the nation, both in numbers of units produced and the geographical distribution and economic and racial integration of the units, and offers a very attractive model for other jurisdictions. See RUSK, *supra*, at 280-89. On the judicial side, the state supreme courts in New Hampshire, New York, and Pennsylvania have ruled that the application of restrictive zoning ordinances in certain situations violate the state constitution. *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); *Berenson v. New Castle*, 341 N.E.2d 236 (N.Y. 1975); *Surrick v. Zoning Hearing Bd. of Upper Providence*, 382 A.2d 105, 111-12 (Pa. 1977); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466, 468 (Pa. 1975); *In re Girsh*, 263 A.2d 395, 397 (Pa. 1970); *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 613 (Pa. 1966). However, these decisions are all narrower and more fact-specific than the bold New Jersey decisions in *Mount Laurel I* and *Mount Laurel II*, and there are no reports of any systematic activity to implement them. See *supra* note 3 for a discussion of these two cases. See also Part IV *infra*, where this Author recommends that researchers undertake a comparative study of the number and type of housing units built in the 4 override states, compared with those built in non-override states including New York and Pennsylvania.

13. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *NOT IN MY BACKYARD: REMOVING BARRIERS TO AFFORDABLE HOUSING* (1991) [hereinafter KEMP COMM'N REPORT]. A more recently coined term is BANANA, Build Absolutely Nothing Anywhere Near Anything. See <http://www.acronymfinder.com>.

these laws have expanded the "geography of affordable housing,"¹⁴ helping to produce such housing in places where it otherwise would not have been built: 18,000 units in Massachusetts;¹⁵ 1600 in Connecticut;¹⁶ and 15,000-20,000 in New Jersey¹⁷. However, only a small percentage of the housing units built in the suburbs in the past decades has been affordable, and there is still an urgent need for such housing. Further, although the occupancy data is very incomplete,¹⁸ it seems the statutes have fostered little movement from city to suburb by lower-income families and less racial integration. The patterns of racial and economic segregation noted by the Kerner Commission have persisted over the past 30 years, further embedding what two social scientists have called an "American Apartheid."¹⁹ The partial accomplishments of the statutes only underscore the hard work still required to create the desired "geography of opportunity." At this point, the statutes merit only a conditional two cheers.²⁰

Given the importance of the statutory goals and the difficulty

14. Associate Professor Krefetz coined this very apt expression. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort To Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. (forthcoming 2001).

15. See Krefetz, *supra* note 14 (manuscript at 18-20) (citing Massachusetts figures).

16. Tondro, *supra*, note 4 (citing Connecticut figures).

17. John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. (forthcoming 2001) (citing New Jersey figures).

18. The lack of accessible and reliable data is a serious problem in monitoring the implementation and evaluation of these statutes. It is a serious problem even with respect to units proposed and built; it is a major and fundamental problem with respect to the characteristics of the occupants of these units. There is some reliable occupancy data but only from New Jersey. See Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1286-88 (1997). However, that data is both incomplete and now dated.

19. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). Their Table 8.1 showing housing patterns in 30 metropolitan areas from 1970-1990 presents a clear picture of increasing segregation. *Id.* at 222. More recent data suggests that there has been improvement in southern and southwestern cities. Racial segregation is much less severe in metropolitan areas where the major city has elastic boundaries, like Albuquerque and San Antonio. PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 84 (1997).

20. As discussed in Part II, the statutes have both a production goal and a mobility goal. The two cheers are conditional on improved performance in serving the mobility goal by reaching out more effectively to low-income urban families who might be interested in moving into affordable suburban housing. To the extent that the statutes serve only the production goal (producing suburban affordable housing, but housing

of achieving them, it is essential that the statutes operate as effectively as possible under ever-changing social, economic, and political conditions. The suggestions and criticisms from the conference and in these papers will improve the effectiveness of the statutes' administration and interpretation. However, it is also necessary to recognize their inherent limitations, which flow directly from three major conceptual flaws and several related operational weaknesses.²¹ The fundamental flaw is that the statutes established only a private right, not a public obligation. Framing the legal issue solely as a private right has ignored the important public interests at stake and has unduly narrowed legal and policy discussions, as well as program development. Instead of imposing a duty and responsibility on state government and local towns to increase the supply of suburban affordable housing, the statutes have permitted these entities to meet their statutory obligation simply by reacting to particular development proposals. The second conceptual flaw has been the decision to ignore race in program design, data collection, and program evaluation.²² Racial discrimination in housing, housing finance, employment, and education is responsible for the severe racial segregation that plagues our metropolitan areas. Remediation of that discrimination and its effects was a major reason for the enactment of the statutes. Yet, implementation of the statutes has been indifferent to racial consequences, as expressed in the approval of residence preferences and in the absence of outreach and support efforts for minority families. The final conceptual flaw is that, by addressing only zoning, the statutes are partial and woefully incomplete. Exclusionary suburban zoning is only one of the many factors and forces that has caused residential segregation, and any program seeking to reduce such segregation must encompass more than zoning.

Several operational weaknesses flow from these conceptual flaws. Since the statutes address only zoning and only in the con-

that is occupied by moderate-income suburban residents) they may deserve only one cheer. See Roisman, *supra* note 8.

21. These critical observations are not original. Indeed, one or more of them have been made by most of the conference participants and by most commentators cited in the Symposium's extensive and valuable bibliography. See Koneski-White, *supra* note 3.

22. Unlike the flaw concerning private rights versus public obligations and many of the operational weaknesses, the flaw of ignoring race in program design and evaluation is not inherent in the statutes and can be remedied without amending the laws. While the statutes use race-neutral terms, their text, history, and structure support and permit race-conscious efforts.

text of a specific development proposed by a specific builder on a specific site, they do not require the states to establish policies, programs, or funding to increase suburban affordable housing. They provide neither incentives for, nor sanctions against, the towns. Moreover, they offer no funding to builders, nor do they supply information or support to low-income and minority urban families who might seek to move to the suburbs. These weaknesses limit the effectiveness of the statutes.

Part II of this essay describes the goals of these four statutes, their many similarities, and several differences. Part III addresses their weaknesses and discusses stronger, more effective tools that the states have not adopted. It also suggests that the states selected the less effective tool because underlying support for the statutory goals is weak and divided, and the opposition to more robust tools is strong. Part IV concludes by making a series of recommendations for improved understanding and effectiveness. Reviewing both successful programs and recommendations made as long ago as the 1968 Kerner Commission report and as recently as this conference, it suggests that legislatures transform the suburban affordable housing issue from a private right to a local obligation and state requirement. It also urges legislatures to provide the funding necessary to reward towns for meeting this obligation, to assist builders in the construction of such housing, and to attract and support the many minority urban families who wish to live in such housing.

II. DESCRIBING THE STATE OVERRIDE TOOL: GOALS, SIMILARITIES, AND DIFFERENCES

This section identifies the goals of these four statutes, highlights the main technique that they created to achieve these goals, and then discusses several similarities and differences. Each statute has two main goals: production and mobility.²³ The production

23. These two goals are not necessarily congruent or equally supported. Part III discusses the tension between these goals and the different types of supporters of, and the varying levels of support for, each goal.

Professor Roisman and other commentators have identified racial integration as a third goal. Roisman, *supra* note 8 (manuscript at 16) (citing Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of the Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1276 (1997)). As a matter of statutory construction (although not as a matter of public policy), the better view is that integration is one of the reasons that supports the production and mobility goals, as opposed to a statutory goal in and of itself. Although racial riots specifically, and the civil rights movement generally, played a major role in the enactment of the

goal is to increase the production, and thereby the supply of affordable housing in suburban communities. The mobility goal, which sets the locational parameter and rationale for the production goal, is to provide opportunities for mobility that would permit interested low-income, especially minority low-income, families to move from urban to suburban areas.²⁴ Prior to enacting the statutes, the legislatures had observed two related problems: (1) the lack of, and resistance to, affordable housing in many suburban communities; and (2) the concentration of existing affordable housing and low-income persons in cities. They were also aware of the desire of many low-income urban families to take advantage of the educational and increased employment opportunities in the growing suburbs. Along with many presidential commissions and other commentators, the legislatures identified suburban resistance and exclusionary suburban zoning laws as causes of these problems.²⁵

Massachusetts statute, and although the plaintiffs in *Mount Laurel I* explicitly framed part of their case in racial terms, all 4 statutes (and the New Jersey judicial opinions and subsequent administrative regulations) express their requirements in economic, not racial terms. *See id.* (manuscript at 16-21).

24. While the text of the override statutes authorizes the override of local zoning decisions of every type of community — suburban, rural, and urban—my colleague, Professor Eric Gouvin, is correct that, the policy reasons apply only to suburban areas and not to rural towns or cities. Eric J. Gouvin, *Rural Low-Income Housing and Massachusetts Chapter 40B: A Perspective from the Zoning Board of Appeals*, 23 W. NEW ENG. L. REV. (forthcoming 2001). Whatever the strength of the argument for production of new affordable housing in rural areas (and Professor Gouvin argues forcefully that rural affordable housing needs are distinct and probably not best served by new construction) new rural housing does not serve the mobility goal. However, the rural problem is a minor one. In 1990, 90% of the population of New Jersey, 80% of Connecticut, 84% of Massachusetts, and 86% of Rhode Island, lived in urbanized, as opposed to rural, areas. *See* U.S. Census Bureau at <http://www.census.gov/index.html> (last visited Jan. 15, 2001).

While Professor Gouvin is correct on his main point, his other arguments and observations concerning the override statutes miss the mark. *See* Gouvin, *supra*. He goes seriously astray by failing to recognize or to accept these statutes as a purposeful shift of power from local to state government, and the consequent reallocation of roles in order to achieve a public purpose that the legislature determined was thwarted by the preexisting allocation of power to localities. With this shift of power as the premise, the several issues with which he quarrels (such as the presumption, the shift in the burden of proof, the *de novo* review) follow as sensible and straightforward measures to implement the new regime. To take but one example, Professor Gouvin laments that there is no role for the local ZBA in deciding regional housing need. *See id.* (manuscript at 41-50). However, from a policy perspective, in terms of efficiency, consistency, comparative competence and avoidance of bias and error, the legislature correctly assigned that task to a state entity; it makes no sense to have each suburb separately defining regional housing need. The role of the local ZBA is instead to find and evaluate, subject to *de novo* review, the interests and concerns that cut against (as well as support) the proposed housing.

25. The 3 national commissions issuing reports in the late 1960s all made similar

They enacted these statutes in response, aiming to remove the zoning barrier and thereby help in achieving the goals of increased suburban affordable housing and opportunities for city-to-suburb mobility.

Each state adopted a similar technique to achieve the two goals: a statutory procedure for the state override of local zoning decisions, the "state override tool."²⁶ The statutes authorize a state administrative agency or court to override, under certain conditions, a local zoning decision that has disallowed proposed new construction of affordable housing. The statutes implement the state override by creating a "builder's remedy," which a builder can invoke if denied permission to build affordable housing in a locality that has not met its regional housing need. If the town denies zoning for the affordable housing and the builder invokes the statutory remedy, the town has the burden of persuasion to prove that its denial was based on local interests and concerns that outweigh the regional need for additional affordable housing. The town must also prove its case by convincing a state administrative agency or court rather than a local board. The state override tool reallocates power in this specific area from the local to the state government and creates a presumption that there is a substantial need for new affordable housing in all suburbs that have not met a specific numerical standard.

The override tool was designed to increase housing production and thus is properly classified as a supply-side, rather than a demand-side, tool.²⁷ However, unlike the better-known and more widely-used supply-side tools like capital grants, operating subsidies and tax credits, the override tool provides no funds directly. Build-

observations and recommendations. See KERNER COMM'N REPORT, *supra* note 10; NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1969) [hereinafter DOUGLAS COMM'N REPORT]; THE PRESIDENT'S COMM. ON URBAN HOUS.: A DECENT HOME 49-53 (1969) [hereinafter KAISER COMM. REPORT].

26. The reallocation of power from local to state government is the most fundamental and significant part of the statutes. See Gouvin, *supra* note 24. To make the appeal process more efficient and to provide "one stop shopping," the Massachusetts and Rhode Island statutes also reallocate power at the local level and give local Zoning Boards of Appeal authority over matters that might otherwise fall within the jurisdiction of another local board, like the Traffic Commission or the Building Department.

27. "Supply-side subsidies seek to encourage production of more housing units by providing incentives to developers and lenders. Demand-side subsidies are designed to enable recipients to compete more effectively in the marketplace for existing housing units." Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, in RACE, POVERTY, AND AMERICAN CITIES 365 n.31 (John Charles Boger & Judith Welch Wegner eds., 1996). See generally HENRY J. AARON, SHELTER AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES (1972).

ers have used the tool to produce affordable housing in two distinct ways. The first method, "zoning plus funding," was the dominant and expected method at the time the Massachusetts statute was enacted and is feasible whenever adequate funding is available.²⁸ Under this method, builders combine the override zoning with funding (capital grants, low-interest loans, tax credits, and operating subsidies) provided by the federal or state government. The 1968 Kerner Commission called for the production of 6 million units of new affordable housing within 5 years, with the "main thrust . . . in the non-ghetto areas, particularly those outside the central city."²⁹ Its recommendation that the units be located outside the central city was based both on a desire for integration and a recognition that future jobs were being created primarily in the suburbs.³⁰

The housing produced under the "zoning plus funding" method is tied directly to the type of housing production programs funded by the state and federal government³¹ and has been primarily multi-family housing (both family and elderly).³² While income data is not available, the occupants of the units produced by the "zoning plus funding" method are distributed across the range of the low- to moderate-income eligible population.³³

More often than not over the past 30 years, funding for new affordable housing has not been available, and the "zoning plus

28. The Massachusetts statute was enacted at a time of great interest in housing as several Great Society housing programs were being created at the federal level. See ROBERT TAGGART III, *LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID 15-20* (1970). The legislature had also just established the Massachusetts Housing Finance Agency. Act of Sept. 8, 1966, ch. 708, 1966 Mass. Acts 711, *reprinted in* MASS. GEN. LAWS ANN. ch. 23A app. at § 1-3 (West 1994).

29. See KERNER COMM'N REPORT, *supra* note 10, at 260-63.

30. *Id.* at 217.

31. If those programs fund elderly housing, then the suburban affordable housing will tend to be elderly housing. If those programs fund mixed-income family apartments, then the suburban affordable housing will tend to be mixed-income family apartments. If those programs fund both elderly and family housing, then experience shows that the town will prefer the elderly housing, unless the state or federal government requires that family housing be built first or simultaneously as a condition of receiving support for the elderly housing.

32. In the mid-1980s, some developers produced affordable suburban condominium units in Massachusetts as part of that state's Housing Opportunity Program ("HOP"). As discussed in Dean Krefetz's paper, the use of the state override tool with the HOP was controversial. Krefetz, *supra* note 14 (manuscript at 35).

33. The author bases this assertion on his experience as an MHFA Board member, on discussions with federal and state housing officials over the years and on discussion with the presenters at this conference. There is no reliable occupancy data on the Massachusetts or Rhode Island housing units built pursuant to the override statutes.

funding” method has not been possible. When government funding has been lacking, builders have used a “zoning only” approach, achieving housing affordability indirectly through a “density bonus”³⁴ generated from the higher-density use permitted by the override tool. The builder uses some of the increased income from the density bonus to subsidize the below-market-rate affordable units. This second method is, and has always been, the dominant model in New Jersey³⁵ and Connecticut,³⁶ and as housing funds disappear, it is increasingly the primary method used in all states. As Professor Tondro discusses, the “zoning only” method is market-oriented, an attempt to use the very market forces that built suburbia to achieve the statute’s production and mobility goals.³⁷ Relying on the private sector’s profit motive instead of government funding to define the program, the “zoning only” approach tends to produce single-family (detached, semi-detached, and condominium) housing that is affordable only to families at the upper end (that is, the “moderate” end of “low- and moderate-income”) of the eligible population.³⁸ Thus, while the two approaches both produce affordable housing for low- and moderate-income families, they tend to produce different products that are used by different segments of the eligible population.

These are the broad similarities. The next several paragraphs highlight some of the main differences in the operational details of the override process in the four jurisdictions. Each state statute establishes preconditions for its use, including requirements for the type of builder, the nature of affordability, the permitted (and impermissible) local interests, the definition of regional housing need,

34. See, e.g., HERBERT M. FRANKLIN ET AL., *IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* (1974). “A density bonus allows a developer to build the same number of units originally intended on a smaller parcel of land, thereby lowering land costs per unit and allowing the developer to realize a larger profit.” Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 377 (1995).

35. See Payne, *supra* note 17 (manuscript at 3).

36. See Tondro, *supra* note 4 (manuscript at 5-8).

37. See *id.* (manuscript at 15-16).

38. A 2000 amendment to the Connecticut statute attempts to counter this tendency of the “zoning only” method to produce housing primarily for “moderate” income families, as opposed to “low income” families. See 2000 Conn. Acts 206 (Reg. Sess.). The Connecticut statute now requires, as a prerequisite for using the override statute, that not less than 15% of the affordable units go to low-income families — those with less than 60% of the regional median income. See *id.*

As an active participant in and knowledgeable observer of the Connecticut housing industry, Professor Tondro expresses considerable skepticism as to the feasibility of these requirements. Tondro, *supra* note 4 (manuscript at 50-65).

and finally, the existence or non-existence of a "safe harbor" exempting the community from the override process. The following paragraphs highlight the key differences in four different areas.

A. *Type of Builder*

Connecticut and New Jersey impose no restriction on the type of builder who can utilize the override process. Massachusetts, on the other hand, restricts the builder to a "public agency or any non-profit or limited dividend organization."³⁹ The Massachusetts restriction reflects the requirements of the federal and state subsidized housing programs that were newly created at the time of the statute's enactment, requirements that show a certain suspicion of (and need to limit) private profit in public programs. Given sufficient flexibility in the interpretation of the phrase "limited dividend organization" and skill in drafting and planning, the statutory restriction need not be a major barrier to participation in the affordable housing process. However, at the practical level, the requirement probably excludes many smaller, single-family homebuilders. Such homebuilders operate as proprietorships or private corporations and are likely to produce affordable units with no direct public financial subsidy. It is difficult to justify the exclusion of any potential builder of affordable housing.

The better approach is to regulate conduct, not status. Under this approach, all persons and entities who are willing and qualified to build and manage suburban affordable housing would be able to qualify to take advantage of the override tool, regardless of their public non-profit, or private/for-profit status. Problems, if any, with excessive private profits in publicly-funded housing programs are better addressed in the requirements of the particular housing programs, not in eligibility for a zoning override. There is a concern that private developers may be more likely to manipulate the override tool, making "blackmailing" statements to towns so that towns will approve their subdivision. But excluding an entire category of potential builders is an overly-broad way to control the strategic misuse of the statutes.

39. MASS. GEN. LAWS ch. 40B, § 20 (1998). The Rhode Island statute falls in between Connecticut and New Jersey on the one hand and Massachusetts on the other. Unlike Massachusetts, the Rhode Island statute permits a private developer to utilize the override procedure. R.I. GEN. LAWS § 45-53-4 (1999). However, the housing built by the private developer must be "subsidized by the federal or state government under any program to assist . . . low or moderate income housing," and thus the zoning-only approach is not permitted. *See id.* § 45-53-3(5).

B. *Participation in a Subsidy Program*

Connecticut and New Jersey correctly focus directly on the affordability of the units, without regard to whether the builder achieves that affordability through a government program or internally-generated private subsidy.⁴⁰ Reflecting their orientation towards the “zoning plus funding” method, the Massachusetts and Rhode Island statutes require that affordable housing be constructed as part of a government subsidy program.⁴¹ Under a literal interpretation of these statutes, a builder that produced new affordable units as 20% of a new housing development using the “zoning only” method would not qualify for the builder’s remedy because the construction was not part of a government program. No government subsidy, no builder’s remedy.

While intelligent statutory interpretation by the Housing Appeals Committee has softened the edges of the Massachusetts and Rhode Island statutory requirement in some respects by recognizing mortgage interest-rate reduction programs as government subsidies,⁴² the requirement itself is unwise. If writing a statute anew, the better approach for determining initial eligibility for the override process would be to focus on affordability itself and not the means by which the builder achieves affordability.⁴³

C. *Affordability*

While each jurisdiction makes the override tool and the builder’s remedy available only for the construction of affordable housing, the statutes use different approaches in defining affordability. The New Jersey statute incorporates the definition used by the federal Department of Housing and Urban Development: low-income housing is housing for households with a gross house-

40. As discussed in the next sub-section, the Connecticut statute actually recognized both subsidized and unsubsidized programs and established different affordability requirements for each program.

41. MASS. GEN. LAWS ch. 40B, § 20; R.I. GEN. LAWS § 45-53-3(5).

42. *Stuborn Ltd. P’ship v. Barnstable Bd. of Appeals*, No. 98-01 (Mass. Housing App. Committee Mar. 5, 1999), available at [http://www.nellco.org/Databases/Licensed/Social Law Library/HousingAppealsCommittee.htm](http://www.nellco.org/Databases/Licensed/Social%20Law%20Library/HousingAppealsCommittee.htm) [hereinafter *Nellco*].

43. As noted by Chairperson Lohe in *Stuborn*, there is a connection between the goal of assuring continuing affordability and the means of achieving the affordability and the source of the subsidy. *See id.* If the builder achieves affordability through an internal subsidy and imposes no deed restriction on the affordable units, then affordability will likely be lost at the first resale of the property. However, the appropriate response is to address this affordability risk with specific affordability requirements, not with program eligibility requirements.

hold income equal to 50% or less of the median gross household income (for households of the same size) in the region; moderate-income housing is housing for households with a gross household income equal to more than 50% but less than 80% of the median gross household income (for households of the same size) in the region.⁴⁴ Instead of including any income guidelines in their statutes, Massachusetts and Rhode Island instead expressly delegate to federal and state government the authority to define the meaning of low- and moderate-income housing, stating: "low or moderate income housing" means "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute."⁴⁵ The Connecticut statute combines the two approaches and both refers to the standards set by government funding sources and provides its own income guidelines. It defines an "affordable housing development" as either "assisted housing"—housing which is receiving, or will receive, financial assistance by any government program, with the affordability requirements set by the funding agency⁴⁶—or a "set-aside development" in which not less than 30% of the dwelling units will have deed restrictions requiring that the units be sold or rented to families whose income is equal to or less than 80% of the area or state median income, whichever is less.⁴⁷

Recent amendments to the Connecticut statute raise two additional affordability issues: (1) the required allocation of units between low-income and moderate-income households; and (2) the duration of the affordability restrictions. Until recently, none of the jurisdictions had imposed any statutory limits on the relative allocation between low-income and moderate-income residents. All affordable units qualified, whether entirely low-income or entirely moderate-income. However, as a result of recent amendments, Connecticut now requires that not less than 15% of the affordable units (which must be not less than 30% of all the units in the development) must be offered to low-income individuals (those with less

44. N.J. STAT. ANN. § 52:27D-304(c)-(d) (1999).

45. MASS. GEN. LAWS ch. 40B, § 20; *see also* R.I. GEN. LAWS § 45-53-3(5).

46. CONN. GEN. STAT. § 8-30g(a)(1)(A)-(3) (1999).

47. *Id.* § 8-30(g)(a)(1)(B). While the concept appeared in the original act, the term "set-aside development" was added in the 2000 amendments, which also increased the required percentage of set-aside units from 25% to 30% and, as noted in the next paragraph, added a specific income mix requirement and extended the duration of the affordability restrictions from the 30 years added by the 1999 amendments to 40 years. 2000 Conn. Acts 206 (Reg. Sess.).

than 60% of the median income), with the remaining affordable units to moderate-income individuals and families.⁴⁸ As Professor Tondro explains, this required targeting will make it very difficult for most private developers to build affordable units on a “zoning only” basis, without subsidies.⁴⁹

Connecticut has also recently addressed the duration of the income restrictions on the housing produced under the override process.⁵⁰ The Connecticut statute originally provided that for “non-assisted housing,” the dwelling units must remain affordable “for at least thirty years after the initial occupation of the proposed development.”⁵¹ The 2000 amendments extended that period to 40 years.⁵² The other jurisdictions address the duration issue administratively and appear to rely on the duration conditions imposed by the funding agency.

D. *Definition of Regional Need and Safe Harbor*

A town’s share of the regional need for affordable housing determines whether the town is subject to, or exempt from, the override statute. If a town is below its share of the regional need, it is subject to the override statute; if it meets or exceeds the regional need, it is exempt. The statutes thus place a large premium on the definition of regional need.

The Massachusetts, Rhode Island, and Connecticut statutes use a crude but administratively simple definition of a town’s share of the regional need: 10% of its housing stock. If 10% of a town’s housing stock is “affordable” as that term is defined,⁵³ the town is exempt. The statutory regime does not evaluate the local housing stock, the availability of sites for additional construction, or the local or regional demand for new affordable housing. As Professor

48. *Id.*

49. See Tondro, *supra* note 4 (manuscript at 61-63).

50. In the world of subsidized housing, this issue is known as “expiring use,” and has been a major issue for some years.

51. CONN. GEN. STAT. § 8-30g(a)(1)(B).

52. 2000 Conn. Acts 206 (Reg. Sess.).

53. There are a number of special rules to determine “what counts” as affordable housing. Two established counting practices result in over-counting. For example, Massachusetts has a practice of counting all the units in a mixed-income multi-family apartment complex as affordable, even if only 25% of the units are actually affordable. See MASS. GEN. LAWS ch. 40B, § 20 (1994). Connecticut has a practice of counting homes financed with Connecticut Housing Finance Agency mortgages, even though—since the mortgages will be paid off at the time of resale—there is no guarantee of long-term affordability. See CONN. GEN. STAT. § 8-30(g); see also N.J. STAT. ANN. § 52:27D-304 (West 1986).

Gouvin demonstrates, a rural town with primarily older, low-cost housing, no commuters, and no unmet demand has the same share of regional housing need as an exclusive inner suburb, although the human and societal need for affordable housing is much greater in the inner suburb.⁵⁴ New Jersey uses a more elaborate process that defines regional need for each town using a variety of market factors. First developed by the special trial courts established by the New Jersey Supreme Court in *Mount Laurel II*,⁵⁵ the administrative agency created by the subsequent statute has largely adopted (as well as domesticated) the detailed methodology.⁵⁶

There are recurrent criticisms of both the crude and the more refined approach, and it is doubtful that a perfect methodology exists. As indicated in Section IV, a "growth share" requirement that ties a town's affordable housing obligation to its actual growth provides the most sensible safe harbor (and also best expresses the communitarian moral principle that underlies the housing obligation). However, as between the 10% standard and the more elaborate New Jersey approach, the clarity and simplicity of the 10% standard is preferable.

Two additional distinctive features require comment: the New Jersey provision for Regional Contribution Agreements, and the Connecticut provision for a moratorium. As a result of a legislative compromise, towns in New Jersey can meet up to 50% of their fair share obligation, not by producing affordable housing units in their town, but by making a payment as part of a Regional Contribution Agreement ("RCA") to an approved urban area. Criticized as a shameless triumph of money and politics over principle, and challenged as racially discriminatory, the New Jersey Supreme Court refused to declare the RCA section of the statute unconstitutional.⁵⁷ RCA funds are now said to be the single largest source of housing subsidy funding in New Jersey.⁵⁸

The Connecticut statute features a moratorium that permits eligible towns to avoid override challenges, even if they have not yet met the 10% affordability standard. The protection offered by the

54. See Gouvin, *supra* note 24 (manuscript at 21-24).

55. 456 A.2d at 418-19; see KIRP ET AL., *supra* note 3, at 103-11 (describing the work of the special trial courts and their use of experts to develop the methodology).

56. See title 5, section 93 of the New Jersey Administrative Code for the fair share rules of the Council on Affordable Housing.

57. *In re Township of Warren*, 622 A.2d 1257, 1276-77 (N.J. 1993).

58. See Payne, *supra* note 17 (manuscript at 6 & n.20). Professor Payne estimates that over \$120 million has been exchanged and over 6300 units produced with the RCA subsidies. *Id.*

moratorium is only partial and short-lived – that is, it does not apply to developments in which 95% of the occupants have incomes less than 60% of the area median or to developments of subsidized housing with 40 or fewer units and only lasts 3 years. Moreover, the qualifying standards are highly technical.⁵⁹ Nevertheless, the statute represents a legislative judgment that towns that have accepted affordable housing and that are making good faith efforts to meet their obligation are entitled to some temporary relief from the demands of the override statute.

III. EVALUATING THE STATE OVERRIDE TOOL: LIMITED POWER; MORE EFFECTIVE ALTERNATIVES; REASONS FOR SELECTING THE LESS EFFECTIVE (AS OPPOSED TO MORE EFFECTIVE) TOOL

The state override tool has only limited ability to increase the supply of suburban affordable housing and to enhance opportunities for mobility. As mentioned earlier, it creates only a private right, not a public (state and local) obligation. The override tool is weak in operation because it is indirect, non-directive, and non-financial, as opposed to direct, directive, and financial. More effective tools were and are available but were not and have not been chosen.⁶⁰ After briefly outlining several more effective alternatives, this section suggests that the states selected the less effective tool because support for the goals was thin and divided—strong enough to enact the override statutes, but not sufficiently strong to overcome opposition to a more effective program. The final section identifies a number of measures that states should adopt to achieve more fully the goals of the statutes.

The most effective way for a state to achieve a particular goal is to do so directly. If Connecticut, Massachusetts, New Jersey, and Rhode Island had themselves built suburban affordable housing on a regular basis since the time of the enactment of their override statutes, they would have, by definition, greatly increased the supply of such housing. However, our longstanding practice in housing assistance relies on local approval and local (mainly private) building, not direct state construction.⁶¹ Moreover, a direct approach

59. See 2000 Conn. Acts 206 (Reg. Sess.); Tondro, *supra* note 4 (manuscript at 57-65).

60. While these other tools would not be totally effective in achieving the production and mobility goals, they would be “more effective” than the override tool by itself.

61. See generally LAURENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* (1968).

has been tried only once. The effort by New York State's Urban Development Corporation in the late 1960s to build affordable housing in suburban Westchester County without local approval was swiftly and successfully opposed and has never been tried again in New York or elsewhere.⁶² Even if not able or willing to pursue direct construction, a state strongly committed to increasing mobility could also implement a demand-side program that offers rental or home-ownership assistance targeted to those persons or families moving from an urban to a suburban area, such as the very successful "Move To Opportunity" ("MTO") program developed as part of the consent decree in the *Gautreaux* litigation.⁶³

Alternatively, if the direct approach is not possible, a state strongly committed to affordable housing could still attempt to achieve its goal by being "directive" in two distinct ways: first, to

62. The initial authorizing legislation gave the Urban Development Corporation ("UDC") superogatory power. However, when the UDC acquired land by eminent domain and attempted to build low-income housing in nine towns in Westchester County without seeking local approval, an aroused state legislature quickly stripped the UDC of its power and required it to submit all developments for local approval. See DANIELSON, *supra* note 12; CHARLES M. HAAR & DEMETRIUS S. IATRIDIS, *HOUSING THE POOR IN SUBURBIA* 359-61 (1974).

Although never adopted, the 1968 Kaiser Report recommended that Congress authorize the federal government to purchase land for lease to private developers and to preempt local zoning laws. KAISER COMM. REPORT, *supra* note 25, at 133-34.

63. See *Gautreaux v. Landrieu*, 523 F. Supp. 665, 668-69 (N.D. Ill. 1981), *aff'd sub nom. Gautreaux v. Pearce*, 690 F.2d 616 (7th Cir. 1982); see also LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE COLOR LINE: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000); Mary Beers, *The Gautreaux Assisted Housing Program*, in *HOUSING MARKETS AND RESIDENTIAL MOBILITY* (G. Thomas Kingsely & Margery A. Turner eds., 1993) (describing the voucher mobility program in detail). This housing discrimination lawsuit was filed in 1966 and led to a finding of discrimination and a remedial order that included class-based metropolitan relief, which the Supreme Court later affirmed. *Hills v. Gautreaux*, 425 U.S. 284, 305-06 (1976). The litigation is well described in a wonderful book by the lead attorney for the plaintiffs. See generally ALEXANDER POLIKOFF, *HOUSING THE POOR: THE CASE FOR HEROISM* (1978).

While there have been MTO-like demonstration programs in several cities, attempts to expand the program have been defeated by Congressional opponents, including liberal Democrats. See Philip D. Tegeler et al., *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L. REV. 451 (1995). Republicans objected to the program as "social engineering" and, according to David Rusk, Maryland Senators Barbara Mikulski and Paul Sarbanes responded to constituents objecting to the Baltimore demonstration program by actively joining the Congressional opposition to the expansion of the MTO program. See RUSK, *supra* note 12, at 273-74. No states have adopted similar programs, and the few cities and towns with small programs have adopted them as a result of litigation. See Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335, 339-50 (1993) (describing mobility programs in a number of cities).

the local communities, and second, to their own state governments by using financial incentives and disincentives.⁶⁴ The states could issue a directive to all (or certain targeted) communities in the state requiring that a certain percentage of all or of newly constructed housing units in the town be affordable and providing that failure to comply with the directive would result in a loss of state funds for other programs.⁶⁵ State governments regularly impose such directives and requirements on localities in areas ranging from environmental compliance to education to traffic light placement. An affordable housing directive would require each town to adopt and implement some form of an "inclusionary" zoning ordinance—a technique which, while controversial,⁶⁶ has been successfully implemented for over 2 decades in Montgomery County, Maryland and elsewhere.⁶⁷ A well-designed "directive" program would provide bonus funds to reward communities that complied with the directive and sanctions for those that did not.⁶⁸ On a broader level, states could issue a directive requiring their own state agencies to (1) allocate a certain amount of the limited federal and state housing funds towards the construction of affordable housing in designated suburban communities; (2) remove geographical limits on portable rental certificates and vouchers; and (3) to institute several other well-established counseling, marketing, and recordkeeping programs that have been found to increase regional mobility.⁶⁹ Fi-

64. To enhance opportunities for inner-city families to occupy the affordable suburban units that have been built, states could also be "directive" and require mobility preferences and affirmative marketing for the occupancy of the newly-produced affordable units.

65. A provocatively bold proposal for a federal suburban fair housing initiative suggests that Congress amend the Internal Revenue Code to provide for the loss of the homeowner's deductions on the federal income tax returns of residents in non-compliant towns. See John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1606-11 (1993).

66. See Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1215-16 (1981) (criticizing inclusionary zoning ordinances). But see Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996) (offering a criticism of Professor Ellickson's article and a law and economics perspective).

67. See RUSK, *supra* note 12.

68. The importance of bonus funds as incentives has long been noted in the relevant literature. In their 1974 study of Massachusetts affordable housing and zoning, Professors Haar and Iatridis reported that the only participating town that voluntarily agreed to permit the construction of affordable housing, Stoughton, did so in order to receive a large federal water grant which it desperately needed to improve the town water supply. HAAR & IATRIDIS, *supra* note 62.

69. Tegeler et al., *supra* note 63, at 471-74, 481-82 (discussing thoroughly the second and third issues).

nally, a state could support production and mobility by specifically allocating funds to produce the suburban affordable units, to recruit and support the mobility occupants for that housing, and to reward towns that cooperated in the production of the housing.⁷⁰

Instead of pursuing these goals directly through a directive or with targeted financial support,⁷¹ the states instead chose an indirect, non-directive, and non-financial tool that has been, predictably, limited in its effectiveness. The override tool does not require the state to give priority to the production of new suburban affordable housing or to the use of Section 8 rental certificates to increase mobility. By itself, the override tool neither rewards towns for good performance nor imposes meaningful sanctions on recalcitrant towns or their residents.⁷² Local governments, which regularly work with programs that use both carrots and sticks, accurately assess the absence of incentives and sanctions in the override statutes as a sign of weakness. Further, the statutes depend entirely on third-parties to construct new housing and do not themselves provide any financial or other assistance for the construction, marketing, or management of such housing, all at a time when federal financial support for affordable housing construction has sharply declined and state funding has been very limited.⁷³

Why did all 4 jurisdictions select an inadequate tool instead of

70. The legislature that enacted the Massachusetts statute clearly envisioned financial support from federal housing programs. The 1968 Kerner Commission, 1968 Douglas Commission, and 1969 Kaiser Commission, all of which recommended zoning overrides to promote suburban affordable housing, also recommended major expansion of federal financial support for subsidized housing. See ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 163 (1973) for a proposal to provide payments to towns that accepted new affordable housing, including bonus school payments and community service funding.

71. As discussed by Dean Krefetz, Massachusetts has used a directive (in the form of Executive Orders) at various times with considerable success, conditioning grants on compliance with affordable housing goals. Cf. Krefetz, *supra* note 14 (manuscript at 10-12). As demonstrated earlier, at the time of the enactment of the Massachusetts statute, there were a number of new housing programs and a new state housing finance agency to provide financial support for affordable housing, albeit without suburban targets. See *supra* note 28 for this discussion.

72. The statutes impose a sanction on towns, in the sense that a town that has not met its regional need must pay to defend itself in a zoning appeal. Furthermore, because of the balancing test favoring regional housing needs and the switch in the burden of proof, a noncomplying town is more likely to lose such appeals and thus be ordered to approve the development. See, e.g., Krefetz, *supra* note 14 (manuscript at 9-10) (discussing this aspect of the Massachusetts statute).

73. See Krefetz, *supra* note 14 (manuscript at 33) (discussing the decrease in federal funding of affordable housing).

other, more effective tools? The likely answer is the obvious one:⁷⁴ the comparative strength of the support for the goals and the techniques for achieving them versus the strength of the opposition and the support for other, competing goals.⁷⁵ Support for the goals was just strong enough to overcome the opposition and to achieve the enactment of an override statute. However, the support was too weak and not sufficiently united to overcome the opposition to a more robust statute and more effective programs. The following paragraphs discuss first the limited strength and divided nature of the support and then the opposition to the goals and the support for the competing goal of local autonomy.

With respect to the support for the override statutes, the thinness of the initial voting margins and the persistence of efforts to repeal and amend have been frequently noted.⁷⁶ Less discussed has been the lack of clarity and agreement among supporters on the underlying reasons that animate the goals and the lack of a consensus on why we as a society care (or should care) about the production of suburban affordable housing and increased opportunities for mobility from city to suburb. No single reason commands a strong consensus, and this weakness limits the ability to mobilize more resources to achieve the statutes' goals.

One must begin by acknowledging two basic facts. First, in the United States, there is only limited support for government efforts to increase affordable housing production.⁷⁷ Most housing is pro-

74. Cf. Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration That the Obvious Is Plausible*, 61 TENN. L. REV. 69, 71-73 (1993) (observing that "the aspirations embodied in the doctrine of the Rule of Law demand the critical engagement with legal practice rather than placid and blind acceptance of that practice").

75. Another explanation for why all 4 states chose a less effective tool lies in the evolution of public policy. In the late 1960s, 3 major federal commissions — the Kerner Commission, the Douglas Commission, and the Kaiser Commission — strongly promoted zoning overrides combined with federal housing subsidies as the preferred method of achieving suburban affordable housing and mobility. Inclusionary zoning ordinances and voucher programs did not appear until the early 1970s.

There was a stronger zoning approach that was considered and rejected — giving to affordable housing developments the type of absolute exemption that, in Massachusetts, is authorized by statute for educational, religious, and agricultural uses. See MASS. GEN. LAWS ch. 40A, § 3 (1994). The Massachusetts legislature rejected the total exemption, in this Author's opinion, because it quite correctly trusted developers less than churches, educational institutions, and farmers. It was also properly concerned that, if an exemption was approved, a huge number of developers would try to take advantage of the exemption, putting too much pressure on towns and giving towns too little control.

76. See Krefetz, *supra* note 14; Roisman, *supra* note 8; Tondro, *supra* note 16.

77. While we have formally had a national housing program since the enactment of the 1934 Housing Act, and a Cabinet-level housing agency since the creation of the

duced by the private market, and our dominant method of providing affordable housing is a “trickle down” policy, as opposed to a new construction policy.⁷⁸ Thus, support for affordable housing, whatever the location and regardless of occupants, is likely to be limited.

Second, as with all programs espousing related but distinct goals (and certainly true with the production and mobility goals of the override statutes), different groups of supporters have different interests and may favor one goal more than the other. For builders, the construction trades, realtors, and supporters of deregulation,⁷⁹ the primary interest is in stimulating additional housing construction, with less concern for either affordability or mobility and the suburban location. For low-income housing advocates, the primary focus is affordability—the more low-income housing, the better—again with less concern about (city or suburban) location. For others, increasing mobility is an essential part of a regional effort to help—in different ways and for different reasons—urban families, the city, and the suburbs.

Suburban affordable housing can open the doors to suburban education, employment and life for an urban family otherwise priced out of that American dream. To the extent that these educational, employment, and living opportunities are an important part of American life, providing access to these opportunities serves the

Department of Housing and Urban Development in 1965, funding has always been limited. See Krefetz, *supra* note 14 (manuscript at 14). See also *supra* note 6 and accompanying text for a discussion of the 1934 Housing Act. Funding for affordable housing programs has always been dwarfed by the support for “private” housing provided by the interest and property tax deductions allowed homeowners on their federal tax return. The combined federal subsidy to homeowners exceeded \$74.7 billion in 1993, while the subsidy for low-income housing assistance was only \$18 billion. See Salsich, Jr., *supra* note 27, at 349; see also JARGOWSKY, *supra* note 19, at 208-09.

78. “Trickle down” is a “theory that economic benefits to particular groups will inevitably be passed on to those less well off.” 28 OXFORD ENGLISH DICTIONARY, 515 (2d ed. 1989). Under this practice, housing produced by private market forces ages, becomes less desirable, and then becomes available to lower-income individuals and families. This trickle down method of providing affordable housing was also described as “filter down.” James Wallace, *Housing Policies, Production and Affordability*, in HOUSING IN THE 21ST CENTURY: A SYMPOSIUM SPONSORED BY THE URBAN LAND INSTITUTE AND THE CENTER FOR HOUSING POLICY 27 (2000), http://www.uli.org/Pub/Media/A_issues/A_HoL3_Sym.pdf (Mar. 29-30, 1999) (on file with the Western New England Law Review).

79. Deregulation advocates view restrictive zoning as an example of inefficient government regulation that artificially raises the costs of housing (and other products). While they support the zoning override tool, their recommendations are much more far-reaching. KEMP COMM’N REPORT, *supra* note 13.

national and moral goal of increasing equality of opportunity.⁸⁰ To the extent it provides suburban housing opportunities for African-American families, such mobility can be a partial (too little, too late) remedy for the unlawful racial discrimination that has been a regrettable but persistent part of our history, especially during the post-war building of the American suburb. Such opportunities can also provide modest steps towards racial integration and the reduction of racial isolation. In addition to helping families and individuals, some supporters also argue that mobility is a necessary and important part of a program to strengthen cities by reducing the hypersegregation and concentration of very poor individuals and families in urban areas.⁸¹ Therefore, by strengthening the city and the region of which each suburb is a part, mobility will strengthen the suburbs as well and better prepare them for intense inter-regional competition.⁸² Others argue that the increased diversity will enrich suburban life and also promote the communitarian moral goal of taking care of those in a particular community that need our assistance.

These very different underlying reasons provide the separate strands of support for new suburban affordable housing, but do not point in a single programmatic direction or command the same level of support. For example, a "localist" version of the communitarian moral goal favors taking care of those in the local community and supports elderly housing and residence preferences; such a reason might support some new suburban affordable housing, but not mobility.⁸³ On the other hand, a demand-side program of housing

80. See Laurence E. Lynn, Jr. & Michael G.H. McGeary, "Conclusions", in *INNER-CITY POVERTY IN THE UNITED STATES* (Laurence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990); Paul E. Peterson, *Introduction: Technology, Race and Urban Policy*, in *THE NEW URBAN REALITY* (Paul E. Peterson ed., 1985).

81. See MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997) (arguing that deconcentration works on two levels: at the individual level, by providing opportunities for families; and at the community level, by reducing the poverty population to a more manageable size so that social programs have a greater chance of success); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* 144 (1987) (reporting on the "concentration effects" of very poor families in urban areas).

82. This argument is made by most of the prominent "regionalists," such as David Rusk, Myron Orfield, Anthony Downs, and, to a lesser extent, Paul Jargowsky. See JARGOWSKY, *supra* note 19, at 195.

83. While in *Mount Laurel I*, the town opposed affordable housing for African-Americans who had long lived in town, *Mount Laurel I*, 336 A.2d at 717, the localist approach will usually provide housing primarily, and often only, for white persons. Affordable housing advocates use the localist rhetoric extensively, arguing that affluent suburbs need to build affordable housing to provide housing for those that work in

vouchers (or targeted funds for the purchase of existing homes) will enhance opportunity, mobility, and integration but will not directly provide any new construction. Construction under the "zoning-only" method will tend to produce single-family units built in the outer suburbs (where raw land is more readily available and land prices are lower) and also the smallest allowable number of affordable units at the highest allowable price. However, such "zoning-only" uses will create the least opportunity for city-suburb mobility and will provide new affordable housing units to only the least needy of the possible beneficiaries.

Support is further limited because the political representatives of a major group of potential beneficiaries—African-American urban families—are not always in agreement with the technique or the goals. Concerned about the possible diversion of scarce housing and community development funds from urban to suburban uses, as well as the possible loss of residents (and the decreased aid that might follow a shrinking population), many urban leaders give at most tepid support (and often quiet opposition) to the mobility rationale and instead favor urban redevelopment.⁸⁴ Others support helping city residents find and obtain suburban jobs (through support for reverse commuting and better information), not suburban housing. While there is clearly a strong interest in mobility, it is not known what percentage of urban, low-income families (and especially minority low-income families) would prefer suburban, as opposed to urban, affordable housing if they had a choice.⁸⁵

town (police officers, fire fighters, secretaries at town hall and in the suburban office parks) and for the thirty-somethings who grew up in the town but cannot afford to live there with their young families. Professor Roisman quite rightly criticizes this approach. *See generally* Roisman, *supra* note 8. While persuasive in building support at the local level, the localist vision does not justify state intervention in local decisions and provides no support for mobility. At the policy level, absent improper motives or negative externalities, there is no compelling reason for a state to impose Thornton Wilder's political philosophy on each of its communities. If they want to adopt it, fine; if not, that should be fine too.

84. At the conference, Henry Thomas, the executive director of the Urban League of Greater Springfield, stated that, while he supported both suburban affordable housing and housing for urban community development and redevelopment, he strongly believed that urban initiatives should have a higher priority. Henry Thomas, Remarks at Western New England College School of Law Conference on Increasing Affordable Housing and Mobility in Three New England States and New Jersey: Comparative Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law (Dec. 10, 1999) [hereinafter *The Housing Conference*]. David Rusk notes that very few urban mayors have spoken out for regional approaches, and states that mayors have been "missing in (in)action" on this issue. *See* Rusk, *supra* note 12, at 312-15.

85. *See* John O. Calmore, *Spatial Equality and the Kerner Commission Report: A*

Finally, the method and results of implementation may affect the level of support. If, as the limited data suggests, the occupants of suburban affordable housing turn out to be overwhelmingly white and primarily town employees or children of current suburban residents, then support from traditional civil rights organizations will decline and other supporters may re-evaluate the basis of their support.⁸⁶

In addition to the relative thinness of the support and divergences among supporters, there is also strong opposition to the goals and any type of override technique arguments that have been thoroughly analyzed over the years by Anthony Downs, among others.⁸⁷ Local autonomy has incredibly strong support, justified by "allocational efficiency in the provision of public services, democratic citizenship, and self-determination."⁸⁸ A traditional aspect of that autonomy has been the creation of a particular "type" of community through both zoning and social economic self-selection.⁸⁹ There is a racist fear of minority families and a fear of, and objection to, subsidized housing.⁹⁰ The opposition is so strong that New Jersey communities have paid over \$120 million in Regional Contribution Agreements to avoid affordable housing in their communities.⁹¹ The strength of such opposition contributes to both the fact that there are override statutes in only 4 jurisdictions, and that those 4 jurisdictions enacted statutes of only limited effectiveness.

IV. RECOMMENDATIONS

This essay concludes with several recommendations—some informational, some programmatic—for improving our understand-

Back-to-the-Future Essay, in RACE, POVERTY, AND AMERICAN CITIES, *supra* note 27, at 322; Reynold S. Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763, 767 (1997); Michael R. Tein, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463 (1992).

86. See Roisman, *supra* note 8 (manuscript at 13, 29).

87. ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

88. Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15 (2000); see also *id.* at 15-16 (discussing the efficiency of local decision-making).

89. See generally NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994).

90. See, e.g., Rolf Pendall, *Opposition to Housing: NIMBY and Beyond*, 35 URB. AFF. REV. 112 (1999) (discussing these fears and objections).

91. See Payne, *supra* note 17, at 6 n.17. Professor Payne cites data from the COAH website, which reports that some 6300 RCA units have been financed with these funds. See *id.*

ing of the statutes and their operation, and for increasing their effectiveness. We need more and better data, as well as better and more thoughtful analysis of that data. That analysis will show that a number of programs and techniques have demonstrated their effectiveness, and that states need to fund and support those programs. More fundamentally, however, we need to broaden our sense of moral responsibility and legal obligation. An unfunded builder's remedy too narrowly conceives the moral responsibility and provides too limited an instrument to achieve the goals. We must recognize the moral responsibility of both our states and our towns to provide suburban affordable housing and to increase the opportunities for mobility. We must also impose a practical but enforceable legal obligation on both states and communities to meet that responsibility.

The first set of recommendations is for more and better data.⁹² The existing information is woefully incomplete and wholly inadequate for serious policy analysis and program refinement. As discussed by Dean Krefetz and Professors Tondro and Payne, the available data does establish that a considerable amount of suburban affordable housing has been constructed using the override process—18,000 units in Massachusetts;⁹³ approximately 1600 in Connecticut;⁹⁴ and 15,000-20,000 in New Jersey.⁹⁵ However, the available data also establishes for New Jersey, and strongly suggests for Massachusetts, Connecticut, and Rhode Island, that the override tool has been ineffective in creating mobility, and that minority individuals and families occupy very few of the units created under these programs. However, no state maintains a comprehensive database and the limited data that is available is incomplete and retrievable only with great effort.

At a minimum, states need to adopt data collection and retention programs that provide database files containing:

- 1) the number and type of affordable housing units constructed as part of the override process, organized by town and by zip code, overall and by year (that is, family or elderly, multi-family or single-family, under what type of programs [and the income

92. This Author endorses similar suggestions made by Dean Krefetz and Professor Roisman. See Krefetz, *supra* note 14; Roisman, *supra* note 8; see also Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1048-49 (1998).

93. Krefetz, *supra* note 14 (manuscript at 16).

94. Tondro, *supra* note 16 (manuscript at 22).

95. Payne, *supra* note 17 (manuscript at 5).

range and other requirements of those programs], and by what type of developer);

2) the number and type of affordable housing units that have been proposed and rejected, organized by town and by zip code, and by housing type and developer;

3) the number and type of rejected housing proposals that have been appealed, and the results of those appeals, organized by town and by zip code, and by housing type and developer.

With the sole exception of the Wish and Eisdorfer study in New Jersey,⁹⁶ there is no systematic information on the occupants of the newly-created affordable housing. A major research project needs to be conducted in each jurisdiction and then systematically maintained to gather information on the occupants, including prior residence, income, education, employment information, and race.

Once the appropriate data is compiled and maintained, there is then a critical need for careful studies that integrate the new data with other databases and make the type of comparisons and assessments customary in modern policy analysis but lacking thus far in this area. For example, to understand the trends of suburban affordable housing development and their connection to the general real estate production cycles, researchers need to compare, by state, town and zip code, the number of units of affordable housing built under the override process with the total number of housing units built during the same period. To assess the nature and extent of economic and racial integration, it is necessary to analyze the socioeconomic status of the residents of the zip codes where different types of units have been built and where new occupants have chosen to reside. It would also be useful to evaluate the same data on the zip codes where affordable units have been proposed but rejected.

More broadly, careful policy analysis requires the comparison of the override results with one or more control groups. In this regard, it would be useful to compare the number, location and occupancy characteristics of suburban affordable housing in the override states with similar data from other comparable states (such as New York, Pennsylvania, Delaware, and Illinois) that lack a comparable suburban affordable housing statute, thereby testing the hypothesis that the override states will show more production. Similar comparisons should be made with suburban affordable housing built in the state (California) and counties (such as Mont-

96. Wish & Eisdorfer, *supra* note 18.

gomery County, Maryland) that have used a different type of suburban affordable housing statute, the inclusionary zoning statute, and with the mobility achieved in the "Movement To Opportunity" programs such as the *Gautreaux*⁹⁷ program in metropolitan Chicago.

There is also a need for continued discussions of the tensions between and within the production and mobility goals,⁹⁸ which hopefully will lead to greater clarity and more refined understandings that will be translated into program and funding criteria. As an example, if mobility is recognized as a priority, a state will then consider which locations (inner versus middle versus outer suburb) are most likely to advance that priority and will establish incentives and disincentives accordingly, using pro-mobility factors as criteria in application-ranking and funding decisions. The state will similarly evaluate the housing type (rental or single family) and income level (very low or moderate) that will best facilitate the mobility goal. It will also require mobility preferences (and forbid or sharply limit residence preferences) and will assist with affirmative marketing and a variety of mobility support programs.⁹⁹

Whatever the degree of commitment to suburban affordable housing and mobility, there will also be a host of difficult decisions in program design and implementation. Given the reality of limited (and scarce) funds for new affordable housing production, any decision on the percentage allocated to new suburban affordable housing and mobility, as opposed to urban redevelopment or rural housing, will surely cause difficult political arguments that many would prefer to avoid. Decisions on which income level to target as likely program beneficiaries—very low-, low- or moderate-income families—will determine which urban families will be eligible for this opportunity and which will not. Decisions on the type of housing produced present similar conundrums. On the one hand, home-

97. See *supra* note 63 for a discussion of the *Gautreaux* cases.

98. There have of course been many insightful academic discussions regarding the statutory goals, notably the North Carolina and Pennsylvania symposia, which are cited in the bibliography. See Koneski-White, *supra* note 3. There needs to be a continued focus on goals, programmatic implications, and tradeoffs. While there is, of course, the risk that these discussions will be ignored, or rejected by policy-makers, the greater risk is that the issues themselves will be ignored, or presented and understood in an overly simplistic way that will not produce lasting support.

99. If the state decided that it was unable or unwilling to adopt these mobility-enhancing criteria in the production programs that it oversees or funds, it might decide instead to channel resources into, and to achieve the mobility goal through, a demand-side voucher program. See *supra* note 11 for a discussion of the voucher program.

ownership programs offer a “piece of the rock” and the realization of an important part of the American dream. On the other hand, the families most eligible for and interested in suburban homeownership are likely to be at the upper and relatively “whiter” tier of the target population and, thus, comparatively less in need of this assistance. Furthermore, the restrictions that preserve the long-term affordability of the units will prevent new owners of single-family affordable housing from building the equity in their homes that is such a significant part of middle-class wealth (and a major source of the wealth gap between races).¹⁰⁰ These are not easy discussions to have, nor easy decisions to make. However, not having these discussions and not making the decisions openly means that the decisions will be made in an inadvertent or ad hoc manner, as the consequence of a decision that pays attention to some other, less controversial variable.

There is no shortage of programs deserving of recommendation and implementation. The list provided by the Kerner Commission in 1968 is a good place to start: 6 million new affordable units over the course of 5 years, built mainly in the suburbs, with stronger enforcement of fair housing laws.¹⁰¹ Professor Roisman updated and expanded that list in her 1998 review of *American Apartheid*¹⁰² and in this symposium by including MTO-like mobility programs; explicit, race-based affirmative marketing; and Montgomery County-like inclusionary zoning ordinances. Both lists identify programs and strategies with proven track records in meeting both production and mobility goals. While they all make use of a zoning provision, they also require funding, an active and race-conscious mobility effort, and the recognition and enforcement of a government (as well as a private) obligation.

The experiences in the 4 override states demonstrate that it is not possible to achieve the production and mobility goals without government funding. The “zoning only” private market approach is too limited both in the number of units that it can realistically produce (even in a strong real estate market) and in its ability to reach

100. See generally DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

101. See KERNER COMM’N REPORT, *supra* note 10, at 260. The Kerner Report was issued prior to the 1968 passage of the Federal Fair Housing Act.

102. Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995) (reviewing MASSEY & DENTON, *supra* note 19).

the lower-income levels of the eligible population. In addition to development funding, there is also a need to provide funds to the receiving communities, both as an incentive and reward for cooperation and as compensation for increased costs.¹⁰³

Finally, we need to recognize the moral responsibility of both the state and its towns to provide suburban affordable housing, to increase opportunities for mobility, and to impose a series of practical but enforceable legal obligations on both states and communities to meet that responsibility. The best technique for recognizing this moral responsibility and legal obligation is the "growth share" requirement that has been developed and proposed by John Payne.¹⁰⁴ The requirement is simple and straightforward.¹⁰⁵ Every town is required to assure the provision of affordable housing in its town, with the actual amount of affordable housing set as a percentage (5% or 10%) of the amount of new growth in that town. Each town decides for itself how best to meet the requirement—whether to require subdivision developers to provide that percentage of their units, to build the affordable housing itself, or to work in partnership with private developers. The requirement best expresses the communitarian moral principle that most strongly supports the suburban affordable housing movement and best accommodates that principle to the competing interest in local autonomy. It begins the necessary process of converting the override tool from the private rights of a builder into the public obligation owed by state and local government. If combined with incentives and disincentives incorporated into state funding policies and practices, it will go a long way towards strengthening the commitment to the production and mobility goals and hastening the day when those goals can be achieved.

103. Whatever one's views on increased education and other costs, it is clear that—unless some state or regional agency is assigned the tasks—towns will need to oversee the affordable housing programs in their communities and that there will be expenses in doing so. In his address at the conference, Michael Jaillett, the town manager of Westwood, an outer suburb southwest of Boston, Massachusetts, estimated that one staff person spent one-half of her time in overseeing and administering the town's affordable housing program. Michael Jaillet, Luncheon Address at The Housing Conference, *supra* note 84.

104. See Payne, *supra* note 17 (manuscript at 23 n.38 and accompanying text).

105. That is, the requirement is simple and straightforward as compared to the alternatives, of course. As Professor Payne points out, even the growth share concept has details that need to be developed. However, the basic framework should make their elaboration more comprehensible and therefore manageable. See *id.*